SUPREME COURT, U. S.

In The

Supreme Court of the United States

October Term, 1974

No. 74-750

JACK F. DAVIS, DIRECTOR, DEPARTMENT OF CORRECTIONS (FORMERLY JAMES F. HOWARD, DIRECTOR, DIVISION OF CORRECTIONS) AND K. R. PURVIS, SUPERINTENDENT, SOUTHAMPTON FARM,

Petitioners,

v.

NELSON JAMES LEWIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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NELSON JAMES LEWIS,

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PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PRELIMINARY STATEMENT

Jack F. Davis, Director of the Virginia Department of Corrections and K. R. Purvis, Superintendent of the Southampton Farm, pray that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit entered on November 4, 1974, in the case styled Nelson James Lewis v. James F. Howard, Director and K. R. Purvis, Superintendent, Southampton Farm.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia affirming the judgment of the then Corporation Court of the City of Charlottesville is reported as *Lewis* v. *Commonwealth,* 214 Va. 150, 198 S.E.2d 629 (1973). The opinion of the Supreme Court of Virginia is included herein as Appendix A (App. 1). The Opinion and Order of the United States District Court for the Western District of Virginia, Charlottesville Division, of April 8, 1974, is reported as *Lewis* v. *Howard,* 374 F.Supp. 446 (W.D. Va. 1974) and is included herein as Appendix B (App. 7). The *per curiam* opinion of the United States Court of Appeals for the Fourth Circuit dated November 4, 1974, is unreported but is included herein as Appendix C (App. 15).

JURISDICTION

The jurisdiction of this Honorable Court to issue a Writ of Certiorari in this case is grounded upon 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Fourth Circuit err in affirming the judgment of the United States District Court for the Western District of Virginia where that Court had mechanistically applied the Fifth Amendment prohibition against double jeopardy in this case without adequately considering the unique role of the Certification or Transfer hearing in the total context of the juvenile justice system?

2. Did the United States Court of Appeals for the Fourth Circuit err in affirming the decision of the District Court for the Western District of Virginia, insofar as the

District Court entertained the federal petition for a writ of habeas corpus without making an initial specific finding that the Virginia courts had not afforded Lewis a full and fair opportunity to present his federal constitutional claims?

CONSTITUTIONS AND STATUTES INVOLVED

United States Constitution, Amendment V:

> . . . [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . .

United States Code:

28 United States Code § 2241. Power to grant writ.

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court, of the district wherein the restraint complained of is had.
>
> (b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
>
> (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

28 United States Code § 2254. State custody; remedies in Federal courts.

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it

appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in any evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by

order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight should be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

Code of Virginia (1950), as amended.

§ 16.1-176. *Transfer to other courts; presentment to grand jury.*—(a) If a child fourteen years of age or over is charged with an offense which, if committed by an adult, could be punishable by confinement in the penitentiary the court after an investigation as prescribed in paragraph (b) of this section, and hearing thereon may, in its discretion, retain jurisdiction or certify such child for proper criminal proceedings to the appropriate court of record having criminal jurisdiction of such offenses if committed by an adult; provided, however, that in the event the juvenile court does not so certify a child fourteen years of age or over, charged with an offense which, if committed by an adult, would be punishable by death or confinement in the penitentiary for life or a period of twenty years or more, the Commonwealth's attorney of the city or county, if he deems it to the public interest, may present the case to the grand jury of the proper court of record; and provided, further, that if a child fourteen years of age or older who has previously been adjudged to come within the purview of the juvenile and domestic relations court law for committing an offense indicating a viciousness of character, or an offense which, if committed by an adult, could be punishable by confinement in the penitentiary and is subsequently

charged with committing a felony, the Commonwealth's attorney of the city or county, if he deems it to be in the public interest, may, after a preliminary hearing in the juvenile and domestic relations court, present the case to the grand jury of the proper court of record. It shall be the duty of the Commonwealth's attorney to notify the juvenile and domestic relations court within three days after final adjudication if he deems action by the court of record necessary. Thereafter, the decision as whether or not to present the case to the grand jury shall be in the sole discretion of the juvenile and domestic relations court. If the grand jury returns a true bill upon such indictment the jurisdiction of the juvenile court as to such case shall terminate. If a child fourteen years of age or over is charged with an offense, which, if committed by an adult, could be punishable by confinement in the penitentiary and such child is a fugitive from justice, then the juvenile and domestic relations court may nevertheless certify such child for proper criminal proceedings to the appropriate court as above provided. In no case shall any child under the age of fifteen be so certified, nor shall any such child be indicted or tried under the criminal laws of this State. The ages specified in this section refer to the age of the child or minor at the time of the alleged commission of the offense.

(b) In all cases under this section the court may, unless such information is otherwise available to it from a prior investigation and report to another court, require an investigation of the physical, mental and social condition and personality of the child or minor and the facts and circumstances surrounding the violation of the law which is the cause of his being before the court. Such investigation need not include an examination of the child or minor by a physician or psychiatrist unless the court, in its discretion, so directs. If the court requiring the investigation is a juvenile court, such investigation may be made by the agency

providing probation service under § 16.1-205; if the court requiring the investigation is a court of record, such investigation may be made by the officer provided for in § 53-243. Provided, however, if an investigation and report has been made by the juvenile court and the results thereof certified to a court of record the latter need not order such investigation.[1]

§ 16.1-176.1. *Trial in court of record where juvenile over sixteen has previously been committed to training school.*—If a juvenile sixteen years of age or over, who has been previously committed to any juvenile training school in this State or any other state, is charged with an offense which, if committed by an adult, could be punishable by death or confinement in the penitentiary, the case shall be certified for proper criminal proceedings, if probable cause be found, to the appropriate court of record having jurisdiction of such offense if committed by an adult, unless the juvenile and domestic relations court shall find and shall certify in its order that it is in the public interest for the matter to be disposed of therein.[2]

STATEMENT OF THE CASE

The respondent here, Nelson James Lewis, hereinafter referred to as petitioner, is presently free on a recognizance bond issued by the United States District Court for the Western District of Virginia, Charlottesville Division, pursuant to agreement of counsel during the pendency of this case in this Honorable Court. However, the petitioner is technically detained pursuant to a judgment of the then Corporation Court for the City of Charlottesville of July

[1] § 16.1-176 of the Code of Virginia (1950), as amended, was extensively amended at the 1973 session of the Virginia General Assembly, after the prosecution in this case.

[2] § 16.1-176.1 of the Code of Virginia (1950), as amended, was repealed by the 1973 session of the Virginia General Assembly.

13, 1972, wherein he was convicted on one charge of breaking and entering and two charges of grand larceny and sentenced to serve two years in the Virginia State Penitentiary on each charge for a total of six years.

On June 5, 1972, the petitioner, who was 17 years of age at the time, was initially proceeded against in the Eighth Regional Juvenile and Domestic Relations Court in the City of Charlottesville, Virginia, on three petitions with the adjudicatory hearing taking place on June 9, 1972, and the dispositional hearing taking place on June 16, 1972, when the judge of that court determined that the matter should be disposed of as a juvenile proceeding in that court under § 16.1-176.1 of the Code of Virginia (1950), as amended.

The court declined to certify the matter to the grand jury of the Corporation Court for the City of Charlottesville for treatment as an adult but instead directed that petitioner be committed to the State Department of Welfare and Institutions. Among the matters considered by the judge of the juvenile court was a social history that indicated that the petitioner had seven prior petitions filed against him in the juvenile court, with two of the prior petitions resulting in earlier commitments to the State Department of Welfare and Institutions.

On June 16, 1972, the same date of disposition by the juvenile court, the Attorney for the Commonwealth for the City of Charlottesville gave notice under § 16.1-176 of the Code of Virginia that he deemed action by the court of record necessary and the cases were thereafter presented to the grand jury for the Corporation Court of the City of Charlottesville at its June, 1972, term and the petitioner was at that time indicted by the grand jury on the three charges. Prior to trial in the Corporation Court for the

City of Charlottesville the petitioner, through counsel, filed a Motion to Quash the Indictments on the ground that the prosecution in the court of record would constitute double jeopardy but, after arguments, the judge of the Corporation Court for the City of Charlottesville overruled these motions and the petitioner was convicted and sentenced on the offenses charged on July 13, 1972.

On August 4, 1972, the petitioner filed a Notice of Appeal and Assignment of Error and a Writ of Error was subsequently granted by the Supreme Court of Virginia and the case set down for briefs and oral argument. The Supreme Court of Virginia affirmed the judgment of the Corporation Court for the City of Charlottesville in *Lewis* v. *Commonwealth, supra*, and the opinion of the Supreme Court of Virginia is attached hereto as Appendix A.

On September 11, 1973, only twelve days after the decision of the Supreme Court of Virginia and without seeking a Writ of Certiorari from this Court, the instant federal Petition for a Writ of Habeas Corpus was filed in the United States District Court for the Western District of Virginia at Charlottesville and on October 2, 1973, a Motion to Dismiss on behalf of the respondents therein was filed urging that the Petition for a Writ of Habeas Corpus be denied and dismissed on the basis of the decision of the Supreme Court of Virginia. A Stipulation of Facts was subsequently prepared by counsel for both parties and memoranda were filed with the United States District Court. On April 8, 1974, that court entered its judgment order in the case of *Lewis* v. *Howard, supra*, included herein as Appendix B. On May 2, 1974, the petitioners herein filed their Notice of Appeal and the district court thereafter granted a stay of its order. The matter was briefed and oral argument presented in the United States Court of Appeals for the Fourth Circuit on October 4,

1974, and the judgment complained of was entered in that Court on November 4, 1974, in the nature of a *per curiam* order, said order being included herein as Appendix C.

ARGUMENT

I.

The Trial Of Nelson James Lewis In The Corporation Court For The City Of Charlottesville, Virginia, Did Not Constitute Double Jeopardy Within The Peculiar And Unique Context Of A Certification Or Transfer Hearing Within The Juvenile Justice System And This Honorable Court Should Grant A Writ Of Certiorari In Light Of The Conflicting Decisions Between The Supreme Court Of Virginia And The United States Court Of Appeals For The Fourth Circuit And Especially In Light Of This Honorable Court's Recent Grant Of A Writ Of Certiorari On The Same Issue In The Case Of Jones v. Breed, Case No. 73-1995.

It is clear, as the Honorable District Court Judge pointed out, that this Court has now held that the Fifth Amendment prohibition against double jeopardy in criminal prosecutions is applicable to the states through the Fourteenth Amendment (*Benton* v. *Maryland,* 395 U.S. 784 (1969); *North Carolina* v. *Pearce,* 395 U.S. 711 (1969); *Waller* v. *Florida,* 397 U.S. 387 (1970), *reh. den.* 398 U.S. 914 (1970)). It is equally clear that many of the factors implicit in the concept of due process have been declared applicable to juvenile proceedings, as in *Haley* v. *Ohio,* 332 U.S. 596 (1948) and *Gallegos* v. *Colorado,* 370 U.S. 49 (1962), where Your Honors held that the due process clause barred the use of involuntary confessions against juveniles. And, despite the passage of 67 years from the inception of the juvenile court in Cook County, Illinois in 1899, this Court finally began to deal with the applicability of certain constitutional guarantees to juveniles with-

in the context of juvenile court procedings in *Kent* v. *United States,* 383 U.S. 541 (1966), wherein the Court stated that the latitude the juvenile court possessed within which to determine whether it should retain or waive jurisdiction "assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness" (383 U.S. at 553).

In re Gault, 387 U.S. 1 (1967) marked a milestone in the application of due process requirements to juvenile proceedings when the Court held that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone" (387 U.S. at 13). In that case the Court, in brief, held that due process in the context of a juvenile delinquency adjudicatory proceeding embraced adequate written notice, advice as to the right to retained or appointed counsel, the right to confrontation, the privilege against self-incrimination and the right to cross-examination of witnesses. *In re Winship,* 397 U.S. 358 (1970), mandated the requirement of proof beyond a reasonable doubt during the adjudicatory stage of a juvenile delinquency proceeding. Finally, in *McKeiver* v. *Pennyslvania,* 403 U.S. 528 (1971), the Court refused to impose the due process requirement of a jury trial on juvenile proceedings and held as follows:

> "If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it" (403 U.S. at 551).

Despite the expansionary view of due process taken in the pre-*McKeiver* decisions, not all of the constitutionally mandated procedural safeguards which have been applied to adult criminal proceedings have been incorporated in juve-

nile proceedings. The juvenile court system, primarily because of its rehabilitative philosophy, is still allowed considerable flexibility. Thus, this Court has held that the juvenile is entitled to neither bail nor to an indictment by a grand jury, and he cannot demand that his trial be speedy or public, as well as not being entitled to a jury trial (See Note, *Due Process and Waiver of Juvenile Court Jurisdiction,* 30 Wash. & Lee L. Rev. 591, 592 (1973)). We are thus left in a vast penumbra of doubt as to the direct applicability of the doctrine of former jeopardy to juvenile proceedings. Few courts have held the double jeopardy clause of the United States Constitution, or its state counterparts, applicable to juvenile proceedings but there are cases applying a rule of "fundamental fairness" to specific factual situations (Note, *Double Jeopardy and Due Process in the Juvenile Courts,* 29 U. Pitt. L. Rev. 756, 759-760 (1968).

Not very many cases have been decided dealing specifically with double jeopardy in the juvenile court. The general rule was aptly stated in the Maryland case of *Moquin* v. *State,* 216 Md. 524, 140 A.2d 914 (1958):

> "It seems clear from these authorities that the rule of double jeopardy is applicable only when the first prosecution involves a trial before a criminal court or at least a court empowered to impose punishment by way of fine, imprisonment or otherwise as a deterrent to the commission of crime. The question to be decided is whether the hearing before the Juvenile Court of Montgomery County subjected the defendant to the risk of these penalties. We answer this question in the negative. The juvenile act does not contemplate the punishment of children where they are found to be delinquent. The act contemplates an attempt to correct and rehabilitate. Emphasis is placed in the act upon the desirability of providing the necessary care and guidance in the child's own home, and while the act recog-

> nizes that there will be cases where hospital care or commitment to a juvenile training school or other institution may be necessary, this is all directed to the rehabilitation of the child concerned rather than punishment for any delinquent conduct." (140 A.2d at 916-917).

See also *Locke* v. *Commonwealth*, 503 S.W.2d 729 (Ky. 1973); *R.E.F.* v. *State*, 265 So.2d 701 (Fla. 1972); *Brooks* v *Boles*, 151 W.Va. 576, 153 S.E.2d 526 (1967); *Johnson* v. *State*, 3 Md. App. 105, 238 A.2d 286 (1967); *Ex parte Martinez*, 386 S.W.2d 280 (Tex. Crim. 1965); *Ex Parte Sawyer*, 386 S.W.2d 275 (Tex. Crim. 1965); *In re McDonald*, 153 A.2d 651 (D.C. Mun. Ct. App. 1959), cert. denied sub nom. *Cooper* v. *District of Columbia*, 363 U.S. 847 (1960); *In re Holmes*, 379 Pa. 599, 109 A.2d 523 (1954), cert. denied, 348 U.S. 973 (1955); *In re Smith*, 114 N.Y.S.2d 673 (Child. Ct. Div. 1952); *Dearing* v. *State*, 151 Tex. Crim. 6, 204 S.W.2d 983 (1947); *State* v. *Smith*, 75 N.D. 29, 25 N.W.2d 270 (1946); *In re Santillanes*, 47 N.M. 140, 138 P.2d 503 (1943).

It has thus been written that:

> "The traditional view has been that juvenile proceedings, being noncriminal and nonpenal, do not involve any 'jeopardy' and hence cannot give rise to any problem of former jeopardy." (47 Am. Jur. 2d, *Juvenile Courts* § 45).

It is likewise clear that in Virginia as in most states, juvenile proceedings "are protective, not penal. Proceedings thereunder are of a civil nature, not criminal. They are intended for the protection of the child and society, to save the child from evil tendencies and bad surroundings, and to give it more efficient care and training that it may become a worthy and useful member of society." (*Jones* v. *Commonwealth*, 185 Va. 335, 342, 38 S.E.2d 444 (1946).)

The beneficent purposes spoken of in the *Moquin* case are thus equally applicable to juvenile proceedings in Virginia, and it is submitted that jeopardy does not attach thereto. As the Supreme Court of Virginia reaffirmed in this very case when it said that "we adhere to our earlier view that juvenile proceedings are civil and that jeopardy does not attach in such proceedings to bar subsequent prosecution on a grand jury indictment" (214 Va. at 154).

There are, of course several decisions, representing a minority view, applying the doctrine of former jeopardy to juvenile proceedings. In *Richard M.* v. *Superior Court,* 93 Cal. Rptr. 752, 482 P.2d 664 (1971), the Supreme Court of California concluded that the dismissal of a juvenile petition for lack of sufficient evidence during an adjudicatory hearing barred a subsequent juvenile court hearing on a new petition alleging the same offense. This was a situation where the juvenile was acquitted in a delinquency proceeding and the Court held that a subsequent delinquency proceeding was barred thereby. In *United States* v. *Dickerson,* 168 F.Supp. 899 (D.D.C. 1958), the District Court held the double jeopardy clause applicable to juvenile proceedings but that decision was reversed by the Circuit Court of Appeals which held as follows:

> "Without deciding whether jeopardy can ever attach to a disposition made by a juvenile court, either because the Constitution is directly applicable or because subsequent proceedings would be 'fundamentally unfair,' we hold that in the circumstances of this case no jeopardy attached as a result of proceedings in the Juvenile Court." (*United States* v. *Dickerson,* 271 F.2d 487, 490 (D.C. Cir. 1959).)

The decision of the Iowa Supreme Court in *State* v. *Halverson,* 192 N.W.2d 765 (Iowa 1971) was predicated on the statutory requirements of Iowa and was not bottomed on

the concept of double jeopardy. Likewise the determinations in *Hultin* v. *Beto,* 396 F.2d 216 (5th Cir. 1968), *Sawyer* v. *Hauck,* 245 F.Supp. 55 (W.D. Tex. 1965) and *Garza* v. *State,* 369 S.W.2d 36 (Tex. Crim. 1963) were all based on the due process concept of "fundamental fairness" where the juveniles had been proceeded against in a delinquency proceeding in the juvenile court, committed to the Texas Youth Council and several *years* thereafter tried in an adult criminal court for felonies arising from the same set of facts. *Tolliver* v. *Judges of Family Courts,* 298 N.Y.S. 2d 237 (1969) was a case in which an effort was being made to conduct further proceedings in the same court where an earlier mistrial had been awarded for the failure of a prosecution witness to appear and *In The Interest of P.L.V.,* 490 P.2d 685 (Colo. 1971) similarly does not support the petitioner's position as the question involved in that case was whether the Supreme Court of Colorado would allow an appeal by the state as in a civil case to question a ruling of law where the same Court had previously held that a juvenile proceeding was not a criminal prosecution so that the state could not seek an appeal on a question of law under a state statute governing criminal cases. The Court did hold that jeopardy had attached by the dismissal of the charges so the case was moot but this determination arose in the context of a delinquency proceeding. A similar conclusion was reached in *State* v. *Jackson,* ..... Tenn. ....., 503 S.W.2d 185 (1973), where the Supreme Court of Tennessee held that the state could not appeal in a case in which a juvenile had been acquitted in a delinquency proceeding.

A recent decision by the United States Court of Appeals for the Fifth Circuit, *Fain* v. *Duff,* 488 F.2d 218 (5th Cir. 1973), was relied on quite heavily by the Court below to support its decision. In that case the defendant, 16 years

old, was arrested for breaking into a woman's home and raping her. Eleven days after his arrest, Fain was adjudged delinquent by a juvenile court and committed to the Division of Youth Services for Florida. Nine days later, a grand jury returned an indictment charging Fain with rape and, after the state courts rejected his double jeopardy argument, he obtained relief in the federal courts to bar his adult criminal prosecution. The Florida statute did not provide for any review of a decision by the juvenile court judge to retain jurisdiction and, as Judge Ainsworth in his dissenting opinion pointed out, the procedure in Florida encouraged a race to the courthouse to determine where the prosecution would be initiated. The State of Florida sought a rehearing en banc in the United States Court of Appeals for the Fifth Circuit but that rehearing was denied with four judges dissenting and a subsequent Petition for a Writ of Certiorari was not filed in a timely manner. Thus, with the possible exception of *Fain*, all of the decisions applying double jeopardy in the juvenile context had been cases involving delinquency proceedings rather than waiver or certification proceedings and the *Fain* case arose within the framework of Florida statutes quite unlike those of Virginia.

In *Jones* v. *Breed*, 497 F.2d 1160 (9th Cir. 1974), certiorari granted by this Honorable Court in Case No. 73-1995, the United States Court of Appeals for the Ninth Circuit similarly ignored the problems that inhere in the application of the double jeopardy clause to juvenile proceedings. The United States District Court for the Central District of California approached this contextual problem with greater empathy than did the Ninth Circuit Court of Appeals in *Jones* v. *Breed*, 343 F.Supp. 690 (C.D. Calif. 1972). The District Court Judge in that case stated the following in the course of his opinion:

"It is the second hearing before the juvenile court under Section 701 on which this Court has been asked by petitioner to focus its attention and to find that such hearing was tantamount to a criminal trial wherein jeopardy attached at its commencement thus foreclosing any later criminal prosecution.

"Such finding cannot be made. That hearing was but one step in a comprehensive program developed by the State of California for the handling of delinquent youth. That program, representing the combined efforts of the California legislature and judiciary, is a thoughtful and in this Court's view entirely constitutional effort to strike a realistic balance between the public's right to order and its interest in the proper care and handling of juveniles.

* * *

"The distinctions between the preliminary procedures and hearings provided by California law for juvenile and a criminal trial are many and apparent and the effort of petitioner to relate them is unconvincing. However, even assuming jeopardy attached during the preliminary juvenile proceedings, and further assuming all rights constitutionally assured to an adult accused of crime are to be enforced and made available to a juvenile it is clear that no new jeopardy arose by the juvenile proceeding sending the case to the criminal court. Such transfer neither acquitted nor convicted and could not in any event represent a second trial for the same offense or more than a continuing jeopardy for a single offense.

"While there is no doubt that certain formal and technical rules as to when jeopardy attaches or terminates may have their place and serve a valid function in adult criminal proceedings, to apply these same rigid and inflexible standards to a juvenile court would deprive it of its ability to function. . . ." (343 F.Supp. 691-692; footnotes omitted.)

A similar conclusion has recently been reached by the Supreme Judicial Court of Massachusetts in the case of *In re a Juvenile,* ..... Mass. ....., 306 N.E.2d 822 (1974), wherein the Court dealt with a similar double jeopardy claim and reached the following conclusion:

> "Granting all of these arguments advanced by the petitioner does not, however, result in the petitioner's being put twice in jeopardy. When juvenile proceedings commence against a juvenile for an offense committed between his fourteenth and seventeenth birthdays, there are two procedures under which the matter may be handled. One is that the matter will remain a juvenile proceeding to its conclusion. The other is that before the judge has adjudged the alleged defender to be delinquent, the judge will conclude that the matter should be transferred for disposition under procedures applicable to adults. To be sure, the juvenile complaint is dismissed. However, by statute an adult complaint must be issued forthwith. G.L. c. 119, § 75. The dismissal of a juvenile complaint and the issuance of an adult complaint are contemplated by the statute (G.L. 119 c. § 75) to be in effect one event, and, as such, any jeopardy to which a juvenile was initially subjected under the juvenile complaint continues under the adult complaint." (306 N.E.2d at 829.)

In both of these cases, the courts relied heavily on the concept of continuing jeopardy, a position rejected by the United States Court of Appeals for the Ninth Circuit in reversing the District Court's action in *Jones* v. *Breed, supra.*

The idea of continuing jeopardy was apparently initially posed by Justice Oliver Wendell Holmes in his dissenting opinion in *Kepner* v. *United States,* 195 U.S. 100 (1904), wherein Mr. Justice Holmes stated the following:

> "It is more pertinent to observe that it seems to me that logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy, from its beginning to the end of the cause. Everybody agrees that the principle and its origin was a rule forbidding a trial in a new and independent case where a man already had been tried once. But there is no rule that a man may not be tried twice in the same case." (195 U.S. at 134.)

Although Mr. Justice Holmes' proposal has never been fully adopted, a continuing jeopardy principle has subsequently received much more favorable attention (*Green* v. *United States*, 355 U.S. 184, 189 (1957); *Price* v. *Georgia*, 398 U.S. 323, 326-329 (1970)). This principle is particularly applicable in a situation where we are viewing a total statutory scheme for dealing with juvenile offenders. It must be recalled here that the petitioner was not acquitted in the juvenile court, but the juvenile court merely made a tentative decision that Lewis should be dealt with as a juvenile rather than an adult, subject to the Commonwealth's Attorney exercising his statutory right under § 16.1-176 of the Code of Virginia (1950), as amended, to present the case to the grand jury where he feels action in the adult criminal court is appropriate for a narrowly defined group of juveniles.

It is respectfully submitted that the petitioner's claim of double jeopardy should not be viewed in a vacuum, but within the important and distinctive context of a juvenile proceeding. The actions that took place in this case do not violate fundamental fairness and, as the Supreme Court of the United States held in *McKeiver* v. *Pennsylvania*, 403 U.S. 528 (1971):

> "If the formalities of the criminal adjudicated process are to be superimposed upon the juvenile court

> system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it." (403 U.S. at 551.)

The essential question then becomes whether, assuming arguendo that double jeopardy applies in any juvenile proceedings, it is applicable in the specific context of juvenile certification hearings held under former § 16.1-176 of the Code of Virginia. In *Brown* v. *Cox*, 481 F.2d 622, 628-633 (4th Cir. 1973), the court below dealt specifically with the role of the waiver or certification hearing in the juvenile process and with the application of the prohibition against double jeopardy to such proceedings. In that case the court described the role of the waiver hearing in the following terms:

> "Juvenile Courts were established to provide an informal, largely non-adversary type of proceeding, whereby offending juveniles, whose background warranted an assumption that they would respond to rehabilitation, could be rehabilitated without criminal taint. But in so doing the legislature recognized that there would be many cases where such assumption would not be justified. Accordingly, in the model juvenile act, it established 'a dual system of justice for the juvenile' to deal with both types of juveniles. If the 'particular act of the child, in connection with a general pattern of behavior and environmental factors, warranted assumption of rehabilitatory control by the State,' then the Juvenile Court retained jurisdiction and undertook to establish a form of commitment or treatment which would accomplish such rehabilitation. On the other hand, should the Juvenile Court conclude that rehabilitation was unlikely to be successful, it should waiver jurisdiction in favor of trial of the juvenile in the criminal court. It was to make that determination that provision for waiver hearings was included

> in the legislation establishing the juvenile court system.
>
> "The real issues in the waiver hearing do not involve the resolution of the juvenile's guilt or innocence. What the Juvenile Court is concerned with at this stage is 'the amenability of the child to the rehabilitative measures available to the juvenile court, the necessity of safeguarding the public from the child, and the heinousness of the alleged offense.' 'A finding of juvenile delinquency upon the basis of the conduct charged is neither required nor authorized' at a juvenile waiver hearing, which should be 'limited to one appropriate to the preliminary nature of the question and the criteria for decision which the juvenile court is required to observe.' Actually, it has been stated that 'in cases coming under the waiver statute the juvenile proceeding is comparable to a preliminary hearing since its purpose is to determine whether the person should be tried as an adult or put within the treatment of the juvenile court.' " (481 F.2d 631; fns. omitted.)

The Virginia legislature recognized many of these policy considerations in its enactment of §§ 16.1-176 and -176.1 as they were in effect at the time of petitioner's hearing. In fact, the petitioner here was precisely within the terms of § 16.1-176.1 as he was 16 years of age or over, had previously been committed to a juvenile training school and was charged with an offense which, if committed by an adult, could be punishable by confinement in the Penitentiary. Under these circumstances, there was a statutory presumption in favor of certification and the juvenile court judge had to make a specific finding that it was "in the public interest for the matter to be disposed of therein" in order to avoid certification (See *Watts* v. *Commonwealth*, 213 Va. 57, 189 S.E.2d 346, 347 (1972); *Brown* v. *Cox*, *supra*, 481 F.2d at 627-628). The juvenile court judge in this case made such a finding and decided to retain jurisdiction over the petitioner, despite his prior record of seven

earlier contacts with the Court. At that point, the Attorney for the Commonwealth, who had apparently been advocating certification from the beginning of the proceeding, gave notice to the Court that he intended to present the case to the grand jury for prosecution as an adult. However, the juvenile court judge had already proceeded to disposition without according to the Commonwealth its three days for notification under § 16.1-176(a) and the question of double jeopardy then arose. And, as has been previously pointed out in prior proceedings in this Court, the transfer of jurisdiction to the Corporation Court did not preclude that latter court from subsequently utilizing the various rehabilitative resources available (See § 16.1-177, Code of Virginia (1950), as amended).

It is submitted that the actions in this case, *within the context of a waiver hearing*, did not violate the concept of fundamental fairness. The focus here should not be on the juvenile court's ultimate dispositional finding committing the child to a training school but on the Court's threshold determination that jurisdiction should not be waived to the court of record for adult criminal proceedings. Accepting that premise, the action of the juvenile court was roughly analogous to the action of a judge of a court not of record holding a preliminary hearing in a criminal case and dismissing the charge. In that situation the action of the court holding a preliminiary hearing does not amount to jeopardy (*Collins* v. *Loisel*, 262 U.S. 426, 429 (1923); *Brown* v. *Cox*, *supra*, 481 F.2d at 633). In fact, the Honorable District Court Judge below had previously held in *Richardson* v. *Cox*, 314 F.Supp. 1326 (W.D. Va. 1970), reversed on other grounds, *Richardson* v. *Cox*, Memorandum Decision (4th Cir. 1971), that under § 16.1-176 of the Code, the Attorney for the Commonwealth "is free to present the case to the grand jury regardless of the decision made by the

juvenile court" (314 F.Supp. at 1328-1329). Although this prior holding by the Honorable Judge below was cited to the Court, it is not referred to or overruled in the decision complained of herein.

In *Watts* v. *Underwood,* Civil Action No. 32-73-R (E.D. Va. 1973), the Judge of the United States District Court for the Eastern District of Virginia, Richmond Division, referred to a contention that former § 16.1-176 of the Virginia Code was unconstitutional in the following terms:

> "The petitioner further contends, however, that a procedure which allows a commonwealth's attorney to in essence override the decision of the juvenile court judge is fundamentally unfair and thus in violation of the due process clause. While *In re Gault,* 387 U.S. 1 (1967), did indeed stress the notion of basic fairness being accorded juveniles, it did so in the context of whether or not juveniles are protected by constitutional guarantees. It by no means gave district courts license under a 'fairness' mantle, to substitute their judgment for that of state legislatures in devising appropriate procedures for handling juvenile offenders. Petitioner's suggestion that this court do so is rejected."

Fundamental fairness is not a one-way street. In the words of Justice Benjamin Cardozo in *Snyder* v. *Massachusetts,* 291 U.S. 97 (1934),

> "Justice, though due to the accused is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." (291 U.S. at 122.)

It is further submitted that this is a particularly appropriate case for the grant of certiorari in that a clear and direct conflict exists between the decision of the Supreme Court of Virginia in *Lewis* v. *Commonwealth, supra,* on the one hand and the decisions of the United States Dis-

trict Court for the Western District of Virginia in *Lewis* v. *Howard, supra,* and of the United States Court of Appeals for the Fourth Circuit in the same case. In addition, this Honorable Court has already granted a Writ of Certiorari to the State of California in the similar case of *Jones* v. *Breed,* Case No. 73-1995, although the factual context of the holding in that case is somewhat different from that in the instant case although the issues of law are quite similar.

II.

Nelson James Lewis Was Accorded A Full And Fair Opportunity At All Stages To Present His Federal Constitutional Claim In The State Courts And Federal Habeas Corpus Should Not Be Utilized As Merely Another Step In The Appellate Process For A Review Of State Court Determinations Without A Prior Finding That The State Court Procedure For Adjudicating Federal Claims Is Constitutionally Deficient.

The petitioner initially raised his double jeopardy claim by a Motion to Quash the Indictment filed prior to trial in the Corporation Court for the City of Charlottesville, Virginia. The state trial court afforded counsel for the petitioner an opportunity to present authorities and argue his Motion to Quash the Indictment and the Court fully and fairly considered the claim. The Supreme Court of Virginia thereafter allowed the same claim to be presented to it in the Petition for Appeal and that Court set the case down for briefing and oral argument. The Supreme Court of Virginia directly confronted the Federal constitutional issue and decided that issue on its merits. The petitioner thereafter declined to seek review of the decision of the Supreme Court of Virginia in this Honorable Court by either a petition for a writ of certiorari or an appeal but recourse was almost immediately had to the United States

District Court by filing a federal petition for a writ of habeas corpus. Neither the District Court nor the Court of Appeals dealt in any way with the adequacy of the state court procedures for hearing federal constitutional claims and, in fact, neither of the courts below dealt with the position taken by the Supreme Court of Virginia in its earlier opinion in this case and neither the District Court opinion nor the per curiam opinion in the Court of Appeals even refer to the opinion of the Supreme Court of Virginia. In light of these facts, it is respectfully submitted that the instant claim should not have been entertained by the federal courts on habeas corpus (See *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 275 (1973); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963); Miller and Shepherd, *New Looks at an Ancient Writ: Habeas Corpus Reexamined*, 9 U. Rich. L. Rev. 49 (1974)).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Writ of Certiorari should be granted, especially in light of the pendency of *Jones* v. *Breed*, Case No. 73-1995, and the judgment of the United States Court of Appeals for the Fourth Circuit in this case should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert E. Shepherd, Jr., Assistant Attorney General of Virginia, counsel for Jack F. Davis, Director, Department of Corrections and K. R. Purvis, Superintendent, Southampton Farm, in the captioned matter and a member of the bar of the Supreme Court of the United States, do hereby certify that on the 13th day of December, 1974, I mailed a copy of the foregoing Petition for a Writ of Certiorari to the judgment of the United States Court of Appeals for the Fourth Circuit by first class mail to L. B. Chandler, Jr., Esquire, Chandler and Huff, 415 Park Street, Charlottesville, Virginia 22901, counsel for the respondent herein.

ROBERT E. SHEPHERD, JR.
Assistant Attorney General